IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 304 of 2001

with

CRIMINAL REVISION APPLICATION No 305 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 304 of 2001
   MR DC SEJPAL for Petitioner No. 1
   Mr S J Dave, APP for Respondent No. 1
   MR TS NANAVATI for Respondent No. 2
2. Criminal Revision Application No. 305 of 2001
   MR DC SEJPAL for Petitioner No. 1
   Mr S J Dave, APP for Respondent No. 1
   Mr T S Nanavati for respondent no.3
   Mr Mihir Thakore, Sr.Counsel for Singhi & Co. for respondent 4

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 21/03/2003

ORAL (COMMON) JUDGEMENT

The petitioner-original complainant in criminal case No.1316/99 before the learned Judicial Magistrate First Class at Borsad in Kheda district, has preferred these two criminal revisions under section 397 read with section 401 of the Criminal Procedure Code, 1973 (for short, 'the Code'), in order to challenge a common and consolidated order recorded by the said Court on 27.4.2001 in the aforesaid criminal case below applications Exh.22 and 25 filed by different set of accused persons facing the said criminal case.

2. Out of these two revisions, criminal revision application No. 304/2001 has been filed against the said order passed by the said court on an application of respondent no.2 who was accused no.5 in the said criminal case whereas revision application No.305/2001 has been filed by the petitioner against the discharge of other accused persons who were facing the said criminal case before the said court.

3. The facts of the case of the present petitioner-original complaint before the trial court in the aforesaid criminal case may be briefly stated as follows:

The present petitioner-original complainant had filed criminal case no.1316/99 before the aforesaid court for an offence punishable under section 138 of the Negotiable Instruments Act, 1881. Therein it was stated by the present petitioner, that on account of a contract of security, the contesting respondents in both the revision applications had issued a cheque in favour of the petitioner-original complainant on 10.11.1998 which was delivered to the to the petitioner on 11.11.1998. The said cheque contained date 22.3.1999. It appears that the said cheque was presented for payment to the bank and the bank refused to honour the said cheque on the ground that the account was not operating and it was closed and it was transferred in the name of another institution. In fact, the endorsement was that the signature "differs" However, the fact remains that as per the admitted position, the second respondent of revision application No.304/2001, Mr D D Mehta had signed the cheque. But it also remains a fact that the company on behalf of which the said cheque was signed by Mr D D

Mehta, who was originally accused no.5 in the said criminal case, has stopped functioning another company was established and, therefore, the account of the said company was closed and the money was transferred in the name of the new company. In the meantime, the said respondent-D D Mehta had resigned from his position. His resignation was accepted and that fact was conveyed to the Registrar of Companies and there the fact was recorded in the records of the Registrar of Companies. Therefore, the endorsement of the bank was that the "signature differs". However, it is an admitted position that it was not a mere incomplete or irregular signature of D D Mehta. But the fact is that D D Mehta ceased to be an Officer of the said Company and even the bank account of the said company was closed and the money was transferred in the name of the newly constituted company.

4. Any way, on account of the dishonour of the cheque, the present petitioner issued notice as per the provisions of the Negotiable Instruments Act, 1881 (for short, 'the Act'). Since the notice was not complied with and the amount stated in the cheque was not paid by the contesting respondents in both the revisions, the petitioner filed the aforesaid complaint against the contesting respondents of both the revision applications. During the pendency of the said criminal case, the contesting respondents submitted applications Exh.22 and 25 before the trial court. Out of them, D D Mehta being accused no.5 in the said case, had filed application Exh.22 whereas rest of the respondents in the cognate revision had filed application Exh.25 before the trial court. In application Exh.22, respondent no.2 in the first revision application and accused no.5 in original complaint contended that though the cheque was signed by him on 10.11.1998, he had resigned from the office of the company, that the said resignation was accepted and the acceptance of resignation was conveyed to the Registrar of Companies and there also that fact was recorded in the Office of the Registrar of Companies and, therefore, he is not responsible to face the trial. His request was that he may be discharged/acquitted from the office under section 138 of the said act.

5. So far as application Exh.25 is concerned, it was filed by the contesting respondents in Revision Application No.305/01 and there it was contended that the complaint was not tenable against the said respondents. That it was not stated in the complaint that the said respondents were responsible for the day-to-day affairs of the company. That at the best the cheque was issued

by way of collateral security and, therefore, the complaint could not be filed against the said respondents. The said respondents, therefore, prayed that they may be discharged/acquitted of the offence punishable under section 138 of the said Act.

6. The trial court heard both the applications simultaneously and passed a common order dated 27.4.2001 under which the trial court allowed both the applications and held that in view of the fact that the cheque was issued by way of collateral security, the complaint was not tenable and, therefore, applications Exh. 22 and 25 were allowed and the contesting respondents in both the matters were ordered to be acquitted of offence under section 138 of the said Act. Feeling aggrieved by the said common order dated 27.4.2001, the petitioner-original complainant has preferred these two revisions before this court. It has been contended in these two revision applications that the trial court has not properly appreciated the facts and circumstances of the case and has committed serious illegality in allowing the said application of the contesting respondents. That the trial court ought to have considered and appreciated the facts and ratio of the judgment in the case of Shanku Concretes Pvt.Ltd. v. State of Gujarat (2000 (2) GLR 1705 and held that case would not be applicable to the facts of this case. That the trial court has therefore, committed serious illegality in discharging/acquitting the contesting respondents and, therefore, the order of the trial court is illegal and perverse and deserves to be set aside. The petitioner has, therefore, prayed in both the revision applications that the above common order impugned in these two revision applications be set aside and the trial court be directed to proceed ahead with the said complaint against the contesting respondents in both the revision applications.

7. Rule was issued in these revision applications. In response to the service of notice of rule, Mr T S Nanavati, learned Advocate has appeared for the contesting respondent in revision application no.304/2001 whereas the State is represented by Mr S J Dave, learned APP. So far as criminal revision No.305/2001 is concerned, again the Sate is being represented by Mr S J Dave, learned APP whereas the contesting respondents have been represented by Mr Mihir Thakore, Sr.Counsel with Singhi & Company. Learned Advocates for the parties have extended their arguments to a great extent and at great length. They have also shown certain citations in support of their contentions.

8. Learned Advocate for he petitioner, during the course of his argument, has relied upon a decision of the Hon'ble Supreme Court holding that even in case of collateral security, a complaint would not be totally barred and therefore, according to the argument of the learned Advocate for the petitioner, this revision application may be allowed on this solitary consideration as the trial court has acquitted/discharged the contesting respondents on this solitary consideration. We would, therefore, be required to consider decision of the Supreme Court in the case of ICDS Ltd v. Beena Shabeer & Anr. (2002) 6 SCC 426. There the Hon'ble Supreme Court has observed that the words and phrases "Any cheque" and "other liability" occurring in section 138 of the Act are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. That these expressions leave no manner of doubt that for whatever reason it may be, the liability under section 138 cannot be avoided in he event the cheque stands returned by the banker unpaid. Any contra-interpretation would defeat the intent of the legislature. In the said case, husband of respondent no.1 obtained from the appellant a car under a hire purchase agreement. Respondent no.1 stood as a guarantor for her husband towards part payment in respect of the said transaction, respondent no.1 issued to the appellant a cheque, which was subsequently dishonoured and returned to the appellant with a remark "insufficient funds". After issuing to respondent no.1 a statutory notice, which went unresponded by respondent no.1, the appellant filed against her a complaint under section 138 of the Negotiable Instruments Act. The High court quashed that complaint on the ground that a cheque from the guarantor could not be said to have been issued for the purpose of discharging any debt or liability and the complaint was, therefore, not maintainable. The said aspect of the case was dealt with by the Hon'ble Supreme Court in para 10 of the judgment and in para 11 it has been observed that the High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus do not tend any assistance to the contentions raised by the respondents. In above view of the matter and in above view of the judgment of the Supreme Court, learned Advocates for the contesting respondents in both the matters have not advanced any argument before this court on the point that the accused could not be dealt with for offence under section 138 of

the said Act on the ground that the cheque was issued by way of collateral security. However, learned Advocates for the respondents supported the order of the trial court on certain other grounds.

9. So far as revision application no.304 of 2001 is concerned, Mr T S Nanavati, learned Advocate appearing for the contesting respondents has taken up a contention that the cheque was prepared and signed on 10.11.1998 which was handed over to the present petitioner on 11.11.1998. It is also his argument that the account of the said company was closed on 6.5.1998. That the said respondent-D D Mehta resigned from the office on 20.1.1999, the intimation to that effect was conveyed to the office of the Registrar of Companies on 12.2.1999 and the said fact was registered there also. It is also contended that even in reply to the notice of the petitioner dated 11.5.1999, the above fact was disclosed by the said respondent and the said reply was served upon the petitioner. It is also contended by Mr T S Nanavati, learned Advocate that the present petitioner has not come out with a case that the above factual aspects of the case were disputed question of fact and the said respondent has fabricated this story with a view to save his skin. Mr T S Nanavati, has therefore, argued that in view of the above factual situation and in view of the documents produced by the present contesting respondent before the trial court, it was for the petitioner of revision application no.304/2001 i.e. the original complainant to dispute the same before the court below. That we have to consider the fact-situation on the date of the commission of the offence. In support of the said argument, Mr T S Nanavati, learned Advocate for the respondent has relied upon a decision of this court in the case of Alka N Shah v. State of Gujarat, reported in 2000(3) GLH 468. It appears from the fact of the said case that the petitioner had issued post dated cheques in favour of the complainant as Managing Director of a company and the cheques were dishonoured. However, when the cause of action arose, the petitioner was not in service. It has been observed in the said judgment that the cheques were issued sometime before February, 1999 but were post dated cheques. Therefore, due date was 13th July 1999 in order to obtain the corresponding date when the deposit would mature. It has also been observed in it that the petitioner in the said matter had resigned from the company both as Director as well as the Managing Director by resignation dated 27.1.1999 which can be evidenced by form No.32 filed with the Registrar of Companies. On the strength of the aforesaid fact-situation, this court has observed in the said

judgment that since the petitioner was not responsible for the affairs of the company on the date of the commission of offence, complaint under section 138 of the said Act would not proceed against the said petitioner and therefore, the said Misc.Criminal Application was allowed and the complaint was ordered to be quashed against the said petitioner. This decision will squarely apply to the facts of the case on hand. As noticed hereinabove, the cheque was signed on 10.11.1998 and it was earlier than the date which was recorded thereon i.e. 22.3.1999. The respondent in revision application No.304/2001 resigned from the office on 20.1.1999 and the said fact was conveyed to the Registrar of Companies. In that view of the matter, the present respondent could not be treated to be an officer responsible for the management of the company on the date on which the offence can be said to have been committed. Considering the facts and circumstances of the case on hand and considering the facts in the aforesaid decision, it has to be accepted that the said decision will squarely apply to the facts of the case on hand and then on this solitary ground that the respondent was not responsible for the act of the company on the date on which the offence is said to have been committed and, the revision application can be dismissed, following the principles enunciated in the aforesaid case. It would be appropriate to refer to the provisions of section 138 of the said Act as follows:

"138. Dishonour of cheque for insufficiency, etc. of funds in the account -

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

On a bare reading of the said provisions, it becomes clear that for the commission of an offence under this section, it is necessary that a cheque has been drawn by a person of an account maintained in a bank for payment of any amount of money. That in the present case we find that it has become an admitted position that the cheque was actually drawn on 10.11.1998 and it was delivered to the present petitioner on 11.11.1998. There is no dispute that the cheque was dated 22.3.1999 and the records make it clear that the account of the contesting respondent was closed on 6.5.1998. This shows that the account was already closed, before the cheque was actually returned, by the contesting respondents of revision application No.305/2001. In other words, it could not be said that the contesting respondent of revision application no.304/2001 had issued a cheque on 10.11.1998 on account maintained by him. On the contrary the above records make it clear that on 6.5.1998, the account was closed and money was transferred to another institution. It is a matter of record that the cheque was actually written on 10.11.1998 and, therefore, it is clear that the cheque was issued on 10.11.1998 and the persons signing the cheque for the institution issuing the cheque, had no account maintained on that date with a bank in respect of which the cheque was issued. Therefore, when the initial requirement of section 138 of the said Act has not been complied with, no offence can

be said to have been committed with respect to the offence under section 138 of the said Act. In my opinion, the initial words "any cheque drawn on an account maintained" are important words and for committing an offence punishable under section 138 of the said Act, it is necessary that the cheque must have been drawn by a person on an account maintained by him on the date of issue of cheque. Now in the present case we find that the contesting respondent in revision application no.304/2001 cannot be said to have drawn a cheque on an account maintained by him on the date on which the cheque was issued, since the account was closed and the cheque was prepared and signed thereafter. In my opinion, when the above requirement has not been complied with, there is no question of commission of an offence under section 138 of the Act. Whether or not the said act will amount to an offence under some other law, is a question which is not to be answered by this court. In other words, it is not required to be dealt with and decided by this court. Mr D C Sejpal, learned Advocate has made a statement that the petitioner has filed a separate complaint against the contesting respondent of both the revisions for offence under section 420, 467 of IPC etc. Any way, this court is not very much concerned with such a complaint and I do not propose to express any opinion as to whether or not the contesting respondent can be said to have been committed any of those offences. It would be for the court concerned which is required to deal with and decide said issue before which the said issue may arise or has arisen.

10. Learned Advocate for the petitioner has also relied upon a decision of the Hon'ble Supreme Court in the case of NEPC Micon Ltd. v. Magma Leasing Ltd. (AIR 1999 SC 1952). There it has been observed that reading of sections 138 and 140 together, it would be clear that dishonour of the cheque by a bank on the ground that account is closed would be covered by the phrase "the amount of money standing to the credit of that account is insufficient to honour the cheque". Hon'ble the Supreme Court has given reason that when the account has been closed then it would mean that the balance in the said account was Nil and, therefore, it has to be accepted that the cheque was dishonoured even on the ground that the balance was insufficient. The learned Sr.Advocate appearing for the contesting respondent. in revision application No.305/2001 has placed reliance on para 7 of the said judgment. He has tried to distinguish the case on hand from the case reported in AIR 1999 SC 1952. The pertinent observations in para 7 may be reproduced for ready reference as follows:

"After issuing the cheque drawn on an account maintained, a person, if he closes 'that account' apart from the fact that it may amount to another offence, it would certainly be an offence under section 138 as thee was insufficient or no fund to honour the cheque in 'that account'. Further, cheque is to be drawn by a person for payment of any amount of money due to him on an account maintained by him with a banker and only on "hat account" cheque should be drawn. This would be clear by reading the section along with provisos (a), (b) and (c)."

In the aforesaid fact-situation the offence can take place even after issuing cheque drawn on an account maintained by a person, if he closes that account after the issue of the cheque. In other words, the observation is that the offence would take place if the account has been closed after issuance of a cheque. In the present case, we find that the cheque was issued and before issuance of the cheque the account was closed. Therefore, considering this observation of the Hon'ble Supreme Court, it has to be accepted that when the account was not in existence on the date of issue of the cheque, then in that case, it would not amount to an offence under section 138 of the said Act since the initial requirement of section 138 of the said Act cannot be said to have been satisfied.

11. Mr D C Sejpal, learned Advocate for the petitioner in both the matters has also relied upon a decision in the case of John Thomas v. Dr. K Jagdeesan (2001) 6 SCC 30. The pertinent observations can be gathered from paras 8 and 9. There it has been observed by the Hon'ble the Supreme Court that the provisions contained in section 258 of the said Code do not apply to the cases instituted upon a complaint. It was his argument that the present case has been filed on the basis of a complaint before the court concerned and, therefore, the provisions of section 258 of the said Code would not apply.

12. It is true that section 258 of the Code applies to summons cases instituted otherwise than upon a complaint. In such cases, only the court can stop the proceedings. It is true that in the present case, the petitioner has filed a private complaint and, therefore, there cannot be any dispute that the provisions contained in section 258 of the Code would not apply. This does not mean that the trial court cannot acquit an accused in

a summons triable case in the middle of the trial or .... regarding evidence. On a bare reading of the complaint, if no offence is made out and yet the process has been issued, then the accused can make a request to the court concerned that since no offence is made out, the accused may be acquitted. The court can hear the parties and pass appropriate orders. Similarly, in a case wherein the complaint is time barred, the accused can raise such a plea and get appropriate order from the court concerned if factual disputes do not arise. These are not orders under section 258 of the Code. Any way, in a matter before the court, if the court finds that there is no reason to proceed ahead with the trial, then the court can pass appropriate order after hearing the parties. The only requirement is that the court should be able to decide and dispose of the issue in question on reading the complaint and on accepting the averments in the complaint to be true at that stage. When there is requirement of any evidence to deal with a fact-situation and if any disputed question of fact arises, then in that event, the court may not be in a position to deal with and decide such application in the middle of the trial.

13. In the present case, we find that the parties had produced sufficient material before the trial court and the facts were not disputed. As said above, it was not a case before the trial court that the facts stated in the application by the respondents about the date of issue of the cheque, date of closure of account, date of resignation of the contesting respondent and that date of entry in the record of the Registrar of Companies etc. were disputed. In above view of the matter, even this court would be justified in looking into those materials in passing appropriate order having regard to the facts and circumstances of the case.

14. In the present case, we find that the aforesaid fact-situation has not been disputed. Therefore, this court will not be precluded from looking into those materials in order to record and pass a just and legal order. I am also of the opinion that simply because a complaint was filed and simply because it is a summons triable case on a private complaint, the court should record the evidence in all cases and then to decide the matter on merit. I am of the opinion that when factual aspects are not disputed, then the disputed question of law on admitted facts, can be dealt with and decided by the trial court even before the recording of evidence.

15. Mr D C Sejpal, learned Advocate for the

petitioner has also relied upon a case of G Venkataramanaiah v. Sillakollu Venkateshawarlu & Anr. (1999 (2) crimes 171. There the cheque was issued on 6.3.1998 and it was presented on 9.3.1998. It was returned as unpaid with the remarks that accused had closed account on 4.9.1997. There the High Court of Andhra Pradesh has decided that the offence in terms of section 138 of the Act is committed and the proceedings were not liable to be quashed. There the said High Court also considered the object of enactment of section 138 of the Act in para 5 of the judgment. While deciding the said issue, the said High Court had also taken in consideration the fact about the cheque issued before closure of the account and the cheque issued after the closure of account. However, it has also been observed that as far as in a case where signature does not tally it is not returned on account of insufficiency of funds. That a cheque which is returned on account That a closure of account practically means that there are no funds to the credit of the person who issued the cheque with the bank. That if the interpretation adopted by the Bombay High Court and Karnataka High Court is accepted then it will render whole legislation useless. A dishonest person after issuing a cheque or even before issuing a cheque can, at any time at his own will, close the account and in such a situation section 138 shall become ineffective and inoperative.

16. At the same time, it is also required to be considered that the provision made in section 136 has not been taken into consideration in the said judgment. Particularly the initial part of section 138 of the Act which is the basic requirement of the said provision, has not been taken into account and with due respect to the Hon'ble Judges of the said Court, I am not in a position to agree with the observations made therein, particularly in view of the observations of Hon'ble the Supreme Court in AIR 1999 SC 1952 (Ref.para 7 hereinabove).

17. In another decision of Shivendra Sansguiri v. M/s. Adineo, (1996 Cr. L.J. 1816), the Bombay High Court has observed that if a person closes the account before or after the issuance of the cheque because and the cheque is drawn in discharge of a pecuniary liability, it can be always presumed that there exists an account in the Bank in the name of a drawer. This presumption, however, cannot be displaced by misusing cheque facility by closing the account. Again here also, the opening words of Section 138 are required to be considered. If they are considered properly, then it would clearly mean that an offence under section 138 of

the Act would take place only when a cheque has been drawn on an account maintained by the person drawing the cheque. Again, we may be required to consider the observations in AIR 1999 SC 1959 (supra).

17.1. The case of P K Manmadhan Kartha v. Sanjeev Raj & Anr. (2002) 7 SCC 150 is required to be dealt in respect to a case arising from an offence punishable under section 138 of the said Act. It seems that there was some uncertainty about the date as to whether the cheque was issued prior to or subsequent to the closure of the account and difference of handwritings and ink on the cheque. It was observed there that it did not rebut the statutory presumptions under section 139 and 118. Naturally , this disputed question of fact cannot be decided unless the evidence is recorded. In the present case, we find that the above disputed questions of facts are not found to be present.

17.2. We may also take into account a decision of Hon'ble High Court of Karnataka in the case of Deepa Finance Corporation v. A K Mohammed (2002 Comp.cases 636). The pertinent observations found in the judgment are as follows:

xxxx xxxx xxxx

"(ii) That no account number was mentioned in the cheques though they disclosed that they were drawn on an O.D. account. The evidence of the manager of the bank was that the respondent had an O.D. account in that branch but that the said O.D. account was not in existence by the date on which the cheques were drawn by the respondent and the amount outstanding in the said account had been transferred to another account by closing the said account. It is a prerequisite of the offence under section 138 of the Act, that the cheque drawn by a person must be on an account maintained by him with the banker and if such a cheque has been dishonoured, the drawer of the said cheque will be liable for the said offence. Since the cheques in question were not drawn on any particular account maintained by the respondent in the bank, and since the O.D. account of the respondent was not in existence in the said bank by the date on which the said cheques were drawn, no case was made out against the respondent for the offence under section 138 of the Act. The appellant had himself to blame for not taking care to get the account number

mentioned in the cheques of the time when the said cheques were drawn and in nota verifying with the bankers as to whether really the respondent had any O.D. account in the bank by the date on which the cheques were drawn by him."

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17.3. In the case of K M Mathew v. State of Kerala (AIR 1992 SC 2206, Hon'ble the Supreme Court has observed that when any private complaint is filed and process was also issued, then there was no bar to stop the proceedings against any of the accused persons, if the complaint does not prima facie, disclose any offence against. This aspect has been dealt with earlier also.

17.4. In the case of Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd. (2002) 7 SCC 655), it has been observed that a complaint filed under section 138 of the Act against a firm and its partners including a partner to whom no particular work was specifically attributed would not be maintained, if no allegation has been made in the complaint that the said partner was in charge and was responsible to the firm for the conduct of the business of the firm. It was also a case of no allegation that the offence was committed with her consent or connivance or that the same was attributable to any neglect on her part in the matter of issuance of the cheque. It was also observed that in such circumstances, no case was made out against the said partner and hence the complaint was not maintainable against her. Here, it has been argued on the strength of the said observations that there was no allegation made against the respondents of revision application no.305/2001 stating that they were responsible for the day-to-day affairs of the said company.

17.5. In the case of Delhi Municipality v. Ram Kishan (AIR 1983 SC 67), it has been observed that in a case under Food Adulteration Act, a complaint was filed against the company and its Director and Managing Director. However, no clear allegations were made that they were responsible for conduct of business or disputed sample. Therefore, it was observed that the proceedings could be quashed against the Directors but not against Managers. Any way, it was necessary for the complainant to make appropriate allegations against the concerned respondent showing that the concerned respondent was responsible for the day-to-day affairs of the company. For this purpose, attention can be drawn to section 141 of the said Act which may be reproduced hereunder:

"141. Offences by companies - (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purposes of this section, -

(a) "Company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

This provision makes it clear that when an offence is committed by a company, a person who, at the time of the offence was committed, was incharge and was responsible to the company for the conduct of the business of the company shall be deemed to have committed the offence and shall be liable to be proceeded against and punished accordingly. Therefore, before a Director of a company can be joined as accused, it has to be alleged that the said Director of the said Company was responsible to the company and was incharge of the company for the conduct of the business of the company. It has been contended on

behalf of the contesting respondents that the complaint does not show that the contesting respondents in Criminal revision No. 305/2001 were responsible as aforesaid and, therefore, no complaint could be filed against these contesting respondents.

17.6. It has not been shown from the complaint that such allegations have been made against the said respondents. It is true that this aspect of the case has not been dealt with and decided by the trial court. However, it seems that the parties appear to have restricted their argument mainly on the ground that the cheque was issued by way of a collateral security and, therefore, complaint against the respondents was not maintainable. The trial court has dealt with and decided the said issue mainly and substantially and, therefore, the other issues have not been touched. However, these issues have been taken up during the course of their arguments and, therefore, it was necessary for this court to deal with and decide the same. Similar issue about responsibility of the Director who is not incharge of the company and responsible for the conduct of business was required to be dealt with in the case of KPG Nair v. Jindal Menthol India Ltd. (2001) 10 SCC 218. Therefore, it is not necessary to repeat the said observations.

17.7. The complaint filed by petitioner (copy) is on records. On reading it, it is not possible to send any averment or allegation to the effect that the respondents in Criminal Revision Application No.305/2001 were responsible to the company for the conduct of business of the company or that they were responsible for the day-to-day affairs of the company as required by section 141 of the said Act.

18. In the case of Vinod Tanna v. Zaher Siddiqui (2001) 7 SCC 541, it was a case of incomplete signature of the drawer. This is not a fact in the case on hand and, therefore, it is not necessary to deal with and discuss the said decision for he purpose of completing the judgment.

19. An attempt was also made by Mr D C Sejpal, learned Advocate for the petitioner to argue that in a case of the present nature, an offence under section 138 of the Act would be committed even before dishonour of the cheque. This would be an argument contrary to the very spirit of section 138 onwards of the said Act. There it has been made clear that the offence would be committed not on the date of issue of the cheque but on the date on which the period of notice of demand of the

cheque expires. Therefore, it is not acceptable that the offence would be completed as soon as the cheque is issued or it is dishonoured. It is required to be considered that in the case of Anilkumar Sawhney v. Gulshan Rai (1993) 4 SCC 424, it has been observed that post dated cheque remains only a bill of exchange and only from that date it becomes a cheque on being "payable on demand". Therefore, in view of the aforesaid decision, the offence cannot be said to have been committed only on the date of issuance of the cheque. So on the one hand, so far as revision application no.304/2001 is concerned, it is clear that the contesting respondent-original accused no.5 in the main criminal case was not at all an officer of the company on the date on which the cheque was dishonoured. The said fact was conveyed to the petitioner also by way of reply to the notice. Therefore, the said respondent will be entitled to a benefit of the observations made by this Court in the case of Alka Shah (2000(3) GLH 468 (supra). Therefore, the said respondent will be entitled to be acquitted of the offence under section 138 of the Act.

20. So far the respondents in criminal revision application no.305/2001 are concerned, again it is a matter of fact that the cheque was issued on the date on which there was no account maintained by the company issuing the cheque. Therefore, the fact would not fall within four corners of section 138 of the Act. Secondly, the said respondents being the officers against whom the complaint has been filed and who are contesting respondents in Criminal Revision Application No.305/2001 are not alleged to be the officers in charge of the business and responsible for the conduct of the business of the company in question and, therefore even on that count they would not be responsible for answering the complaint of the petitioner. Therefore, on these two considerations, even other respondents would not be responsible to answer the complaint of the petitioner. In aforesaid view of the matter, and for the reasons recorded above and not for the reasons recorded by the trial court, it is found that the order of the trial court has to be maintained and there is no illegality said to have been committed by the trial court in acquitting the present contesting respondents in both the matters.

21. In above view of the matter, in my opinion, there is no merit in these two revision applications and, therefore, both the applications are to be dismissed. The impugned orders passed by the trial court acquitting

the present contesting respondents in both the matters are confirmed on the grounds stated hereinabove and not for the reasons stated in the order of the trial court. Rule discharged.

21.3.2003 [D P Buch, J.]
msp